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CASINO PAUMA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CASINO PAUMA,

and

UNITE HERE INTERNATIONAL UNION

Case No.: 21-CA-161832

**BRIEF OF RESPONDENT CASINO
PAUMA IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISIONS OF
THE ADMINISTRATIVE LAW JUDGE**

Table of Contents

I. INTRODUCTION & SUMMARY OF ARGUMENT	4
II. STATEMENT OF THE CASE	4
IV. QUESTIONS PRESENTED	5
V. LEGAL ARGUMENT	5
1. THE EMPLOYEE HANDBOOK RULES DO NOT VIOLATE THE ACT.....	5
A. The Board should reject the “reasonably construe” standard followed by the ALJ.....	5
B. The Specific Rules do not violate the Act.....	6
1. “Rule 2.22 Solicitation and Distribution”	6
2. “Rule 5.2 Conflicts of Interest”	7
3. “Rule 2.23 Social Media”	7
4. “Rule 2.19 Conducting Personal Business”	7
VI. CONCLUSION.....	8

Table of Cases

Supreme Court Cases

NLRB v. Great Dane Inc., 338 U.S. 26 (1967) 5

NLRB v. The Erie Resistor Corp., 373 U.S. 221 (1963) 5

NLRB Cases

Casino Pauma, 362 NLRB No. 52 4,4,5

Casino Pauma, 363 NLRB No. 60 4,4,5

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) 5,6

William Beaumont Hospital, 363 NLRB No. 162 6

I. INTRODUCTION & SUMMARY OF ARGUMENT

On July 18, 2016 the Administrative Law Judge (ALJ) Robert A. Giannasi issued his decision in the above referenced matter. Respondent Casino Pauma, (hereinafter Respondent), hereby files its brief in support of its exceptions to the Decision of the ALJ. For the reasons stated herein and noted within the Exceptions, the findings of the ALJ that Respondent violated the Act should be reversed.

II. STATEMENT OF THE CASE

The matter was submitted to the ALJ as a result of the “Joint Motion to Submit Case on Stipulation of Facts, and Request to Forego Submission of Short Position Statements.” The ALJ received such factual stipulation from the parties which included a number of exhibits, (hereinafter Stipulation of Facts).

Since the entire case involves rules contained within the Respondent’s “Employee Handbook” the language itself was not in dispute.

The Respondent has had two previous cases before the Board, Casino Pauma, 362 NLRB No. 52; Casino Pauma, 363 NLRB No. 60. The latter case is currently pending before the 9th Circuit Court of Appeal. Respondent, herein, incorporates and reasserts all arguments previously made in both cases, in particular, that the Board lacks subject matter jurisdiction over the operations of Respondent as it is a federally recognized “Indian Tribe;” (362 NLRB No. 52) and/or that the Board should defer this matter to the Tribal Labor Relations Ordinance (TLRO) contained within the Tribal State Compact between Respondent and the state of California (363 NLRB No. 60).

The ALJ’s Decision relies on the Stipulation of Facts, which, in paragraph 8 contains the rules at issue contained in Respondent’s Employee Handbook. The following rules were in dispute: Handbook Rule “2.19, Conducting Personal Business;” Handbook Rule “2.22,

Solicitation and Distribution;” Handbook Rule “2.23, Social Media;” and Handbook Rule “5.2, Conflicts of Interest.”

The ALJ found each of the rules to be unlawful, (See discussion below) and ordered Respondent to rescind the rules from its handbook and republish the handbook without such language.

IV. QUESTIONS PRESENTED

Did the aforementioned rules violate the Act for the reasons stated by the ALJ?¹

V. LEGAL ARGUMENT

1. THE EMPLOYEE HANDBOOK RULES DO NOT VIOLATE THE ACT

A. The Board should reject the “reasonably construe” standard followed by the ALJ.

Throughout the decision, the ALJ follows this Board’s ruling in Lutheran Heritage Village – Livonia, 343 NLRB 646 (2004). The ALJ in following this standard, is engaging in “mind-reading” that employees might reasonably construe a particular rule as an interference with their section 7 rights under the Act. There is no factual basis or record to support that any Casino Pauma employee, in the past and/or currently, has ever construed or interpreted the rules at issue in the manner contended by the Administrative Law Judge.

The Respondent operates a tribal casino on reservation property. There are large amounts of cash on the premises; alcohol is served and there is always the potential for unruly behavior. The Respondent needs a work environment where it can impose discipline and control. This is a right that has been recognized by the U.S. Supreme Court when interpreting the Act. NLRB v. Great Dane, Trailers Inc., 338 U.S. 26 (1967); NLRB v. The Erie Resistor Corp., 373 U.S. 221 (1963).

¹ Although Respondent reasserts the arguments made in Case 362 NLRB No. 52; and 363 NLRB No. 60, will not rebrief such arguments as the cases have been previously adjudicated by the Board.

There is no indication that any of the rules adopted of the slightest bearing and or relationship to employees section 7 rights.

Earlier this year, the Board issued its decision in William Beaumont Hospital, 363 NLRB No. 162. As is the case here, the Beaumont case involved employee handbook rules. Board member Miscimarra, in a dissenting opinion, (page 7) set out why the “reasonably construe” standard adopted in Lutheran Village is erroneous. His reasons were as follows: the rule is single minded and does not take into account the particular policies and rules at issue; the standard is based upon a false premise that employees anticipate such rules are in violation of the Act and it denies employees the guidance of a legitimate employee handbook; it invalidates rules solely because they are ambiguous with such ambiguity being held against the drafter of the rules, while failing to recognize that the NLRA itself is ambiguous; the rule limits the Board’s own discretion, failing to recognize that some rules are simply peripheral to section 7 activity and should not be deemed invalid; the rule does not distinguish between industries or different work environments that might require different rules i.e. such as a casino, where discipline and control are paramount. And, the rule is unpredictable. No employer in the United States can draft handbook rules with any certainty or assurance that the rules will not be subject to challenge based on extremely vague and ambiguous standards that are virtually impossible to define.

B. The Specific Rules do not violate the Act.

1. “Rule 2.22 Solicitation and Distribution”

As noted above, the ALJ applies the “reasonably construe” standard which Respondent disputes. Additionally, this rule is entirely benign. It simply states that if a team member does not wish to be subjected to solicitation, he/she can ask the solicitor to stop. The ALJ contends that the solicitor has a right to engage in “persistent” solicitation even if annoying or disturbing to the

person being solicited. But how far can this go? Respondent's rule is implemented to avoid employee harassment. For this reason, the ALJ decision should be reversed.

2. "Rule 5.2 Conflicts of Interest"

Again, Respondent rejects the ALJ's reliance on the "reasonably construe" aspects of this rule. The purpose of this rule is simply to limit employees from conducting commercial business on the premises of Respondent while employees are working and to avoid approaching and/or bothering guests with personal or commercial causes by employees. It is reasonable under the circumstances that it was drafted.

3. "Rule 2.23 Social Media"

Again the ALJ relies on a "reasonably construe" rule, which Respondent disputes. Respondent operates in a highly competitive tribal casino market in Southern California. Consequently, Respondent must protect its image and social media restrictions noted herein were not created with the purpose of interfering with employee section 7 rights. Limitations on employees referencing the Casino and discussing Casino business without a disclaimer that the posting is their own personal opinion, is reasonable under the circumstances. The ruling of the ALJ as it relates to this rule should be reversed.

4. "Rule 2.19 Conducting Personal Business"

Again, the Respondent objects to the "reasonably construe" standard utilized by the Administrative Law Judge. There is no record of any complaints by Casino Pauma employees regarding the implementation of this rule, or that it has in any way been interpreted as a violation of the employees section 7 rights. The rule is being interpreted in an overbroad manner. As a reality, Casino Pauma team members visit the Casino off-duty to patronize the Casino and there is no restriction on this. The team members understand the parameters of the rule. Consequently,

the ALJ decision as it relates to this rule, should be reversed.

VI. CONCLUSION

For the reasons stated, the decision of the Administrative Law Judge should be reversed with the determination that Respondent has not violated the Act.

RESPECTFULLY SUBMITTED this August 29, 2016

Respondent **CASINO PAUMA**

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, Jacqueline Paterno, declare and state as follows.

I am an employee of the Law Offices of Scott Wilson, which represents Casino Pauma in the above-entitled action. My business address is 711 Eighth Avenue, Suite C, San Diego, CA 92101.

I am a citizen of the United States and reside in San Diego County, California. I am over the age of eighteen (18) years and not a party to the within case or proceeding.

On August 29, 2016, I served a copy by email of the following documents:

BRIEF OF RESPONDENT CASINO PAUMA IN SUPPORT OF ITS EXCEPTIONS TO THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE

on the parties to the action and/or their attorney of record via email addressed as follows:

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I declare the above to be true under penalty of perjury. This Declaration is signed on August 29, 2016, in San Diego, California.

LAW OFFICES OF SCOTT A. WILSON

By: /s/ Jacqueline Paterno
Jacqueline Paterno